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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LESLIE B. RAND-LUBY et al.,

Plaintiffs and Appellants,

v.

AARON'S ENVIRONMENTAL
SERVICE, INC.,

Defendant and Respondent.

G040376

(Super. Ct. No. 06CC06545)

O P I N I O N

Appeal from orders of the Superior Court of Orange County,
Gregory H. Lewis, Judge. Affirmed in part, reversed in part, and remanded with
directions.

Gary Rand & Suzanne E. Rand-Lewis, Suzanne E. Rand-Lewis and
Timothy D. Rand-Lewis for Plaintiffs and Appellants.

Brian P. Stewart for Defendant and Respondent.

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INTRODUCTION

Leslie B. Rand-Luby and Thomas D. Rand-Luby, and their respective trusts (collectively, plaintiffs), appeal after the trial court granted defendant Aaron's Environmental Service, Inc.'s (AES) motion for judgment on the pleadings without leave to amend. We affirm the trial court's order granting the motion for judgment on the pleadings but reverse the court's order dismissing with prejudice the third amended complaint as to AES. We remand to the trial court with directions to grant plaintiffs leave to amend.

In their third amended complaint, plaintiffs alleged AES negligently inspected a residence they were interested in purchasing. Plaintiffs alleged their agreement with AES was "represented" by a report prepared by AES, which was attached to the third amended complaint. That report, however, showed AES had agreed to conduct only a limited mold inspection of the residence's laundry room cabinets. The trial court found the contents of the exhibit contradicted and superseded the general allegations that AES agreed to conduct a broader inspection, granted AES's motion for judgment on the pleadings without leave to amend, and ordered the third amended complaint dismissed with prejudice as to AES.

Plaintiffs contend the trial court erred by granting AES's motion because (1) section 438, subdivision (g)(1) of the Code of Civil Procedure barred such a motion because the trial court had previously overruled a demurrer on the same claim and no "material change in applicable case law or statute" had since occurred; and (2) the third amended complaint contained sufficient facts to allege AES had a broad duty to inspect the residence for structural defects. Plaintiffs also contend the trial court erred by denying them leave to amend.

Code of Civil Procedure section 438, subdivision (g)(1) did not bar AES's motion for judgment on the pleadings because AES had not previously demurred to the negligence claim as alleged in the third amended complaint. (All further statutory

references are to the Code of Civil Procedure unless otherwise specified.) The third amended complaint failed to state facts sufficient to show AES breached a duty to inspect plaintiffs' prospective residence. However, because plaintiffs' counsel explained to the trial court that the pleading could reasonably be amended to show AES agreed to assume *broader* duties to inspect the residence, as evidenced by a subsequent report, the trial court abused its discretion by denying leave to amend.

SUMMARY OF PLAINTIFFS' ALLEGATIONS AND PROCEDURAL HISTORY

In May 2006, plaintiffs filed a complaint against AES and 10 other defendants. In the complaint, plaintiffs alleged that in September 2003, they entered into an agreement to purchase a residence located in Emerald Bay, Laguna Beach. Plaintiffs alleged they hired AES "to inspect the premises for moisture intrusion and the presence of mold, fungi or other material conditions, and to diagnose and fully remediate same." They further alleged AES performed an incompetent inspection and did not discover certain conditions on the property related to "ongoing water intrusion, water intrusion causing fungi and mold, preexisting unrepaired water damage, mold and fungi growth and structural defects in numerous areas of the premises." Plaintiffs alleged they were unaware of these conditions and purchased the residence.

Two years later, in October 2005, the residence sustained water damage due to "water intrusion" caused by wind and rainstorms. In November 2005, "Plaintiffs discovered that water intrusion into the premises was ongoing and had occurred prior to the September 15, 2003 purchase of the property in numerous areas in the premises, including but not limited to the roof system, deck system, retaining wall(s), balconies, windows, doors, patio(s), walls and drains and all conditions." Plaintiffs learned the residence "had numerous undisclosed cosmetic and structural defects" which had not been disclosed to them, causing plaintiffs to suffer damages.

Plaintiffs sued AES, among others, for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud (based on a lack of intent to perform), fraud (based on failure to disclose), fraud (based on negligent misrepresentation), intentional infliction of emotional distress, and negligence. AES demurred to the complaint as to all of the claims alleged against it except for the fraud claim based on a lack of intent to perform. AES also filed a motion to strike various portions of the complaint. AES's demurrer and motion to strike were taken off calendar in light of the trial court's rulings on demurrers filed by other defendants in the case; such demurrers and rulings are not contained in our record.

Plaintiffs filed a first amended complaint alleging the same claims against AES. AES demurred to the first amended complaint as to all but the fraud claim based on a lack of intent to perform. In the demurrer, AES argued plaintiffs' negligence claim failed because the alleged wrongful conduct arose out of a contractual relationship and, thus, plaintiffs were limited to recover contractual damages only. AES also filed a motion to strike portions of the first amended complaint.

The record does not show the court's rulings regarding AES's demurrer and motion to strike portions of the first amended complaint. In the opening brief, plaintiffs assert the trial court sustained the demurrer with leave to amend as to all claims but the negligence claim; the respondent's brief simply states the demurrer was sustained with leave to amend.

Plaintiffs filed a second amended complaint which contained the same claims against AES as were contained in the two earlier complaints, and added one new claim, namely breach of warranty, against AES and other defendants.

AES filed a demurrer as to all of the claims alleged against it. AES again argued the negligence claim failed because plaintiffs were limited to recover contractual damages only. AES also filed a motion to strike portions of the second amended complaint.

The record contains a notice of ruling that AES's demurrer to the second amended complaint was sustained "with *final* leave to amend" as to all claims but the negligence cause of action and the fraud claim based on a lack of intent to perform, on the ground plaintiffs failed to plead facts sufficient to state a cause of action. The notice of ruling further stated AES's demurrer as to the negligence cause of action was overruled. The trial court also granted the motion to strike to the extent it was not moot, with leave to amend.

Plaintiffs filed a third amended complaint containing the same claims against AES (except their claim for breach of the implied covenant of good faith and fair dealing was no longer alleged against AES) as were contained in the second amended complaint. The third amended complaint contained a new allegation that plaintiffs' contract with AES was "represented by the Microbial Inspection Report attached hereto as Exhibit 'E.'" Exhibit E to the third amended complaint stated that the inspection request was a "Limited Mold Inspection" and that, at plaintiffs' request, AES was "to inspect and report on [the] mold discovery in [the] laundry room cabinets." In support of the negligence claim, plaintiffs further alleged AES breached its duty to them by failing to properly inspect "the premises" so as to discover all structural problems and damages, and by failing "to make an adequate inspection of the premises, so as to 'overlook' or neglect to find major problems with the premises in collusion with the [other] Defendants."

AES demurred to the third amended complaint, challenging the breach of contract, breach of warranty, fraud claims, and intentional infliction of emotional distress claim; AES's demurrer did not challenge the negligence claim. AES also filed a motion to strike portions of the third amended complaint.

The trial court sustained the demurrer without leave to amend, based on plaintiffs' failure to plead sufficient facts to state a cause of action. The motion to strike

was granted without leave to amend “as to all requests not rendered moot by the ruling on the Demurrer.” AES filed an answer to the third amended complaint.

AES filed a motion for judgment on the pleadings arguing that the third amended complaint failed to allege sufficient facts to state a claim for negligence—the sole remaining claim asserted against AES. AES argued, in the motion, the negligence claim failed because, in light of the third amended complaint’s incorporation of exhibit E representing the parties’ agreement that AES would conduct a limited mold inspection, plaintiffs could not establish they were owed a duty by AES to inspect the entire house for structural problems. AES also argued plaintiffs failed to allege they suffered any ascertainable damages resulting from AES’s alleged wrongful conduct.

In a minute order, the trial court granted AES’s motion for judgment on the pleadings without leave to amend, stating: “The Motion for Judgment on the Pleadings is Granted. The Court finds the Motion for Judgment on the Pleadings is timely and that [plaintiffs] w[ere] not prejudiced by the error in the notice.^[1] [Plaintiffs] filed an opposition that addressed the merits, and did not request additional time. The Third Amended Complaint fails to set forth facts that [AES] had a duty to inspect the premises for structural defects. Ex E is incorporated into the Third Amended Complaint, and its terms control and supersede contrary allegations. Also, there are no specific facts demonstrating the causal relationship between the breach of duty and the resulting harm. Since [plaintiffs] cannot change the facts of the limited scope of the retention and duty, no leave to amend is allowed.”

¹ AES’s notice of motion and motion for judgment on the pleadings erroneously stated that the hearing on the motion would take place on January 7, 2004 instead of March 3, 2008. AES served on plaintiffs’ counsel a notice of errata as to the incorrect hearing date, which clarified that the hearing would occur on March 3, 2008. Plaintiffs do not raise any issue on appeal pertaining to this notice error.

In a subsequent order signed by the trial court and filed April 24, 2008, the court ordered the third amended complaint dismissed with prejudice as to AES. Plaintiff appealed.²

DISCUSSION

I.

Section 438, Subdivision (g)(1) Did Not Bar AES's Motion for Judgment on the Pleadings.

Plaintiffs contend AES's motion for judgment on the pleadings, challenging plaintiffs' negligence claim was barred by section 438, subdivision (g)(1) because AES had previously demurred unsuccessfully to that claim on the same ground. Section 438, subdivision (g)(1) provides that a motion for judgment on the pleadings may be brought even though "[t]he moving party has already demurred to the complaint . . . on the same grounds as is the basis for the motion provided for in this section and the demurrer has been overruled, provided that there has been a material change in applicable case law or statute since the ruling on the demurrer."³

² Section 581d provides in relevant part: "All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes, and the clerk shall note those judgments in the register of actions in the case." (See *Cano v. Glover* (2006) 143 Cal.App.4th 326, 328, fn.1 ["An involuntary dismissal effected by a minute order signed by the trial court is an appealable order"].) Here, plaintiffs appeal from a written order of dismissal that was signed by the trial court and filed. The order, therefore, is appealable under section 581d.

³ Although motions for judgment on the pleadings under section 438 may not be made on grounds that previously were raised unsuccessfully by demurrer unless there has been a material change in the law, nonstatutory motions for judgment on the pleadings may be made without any such limitation. (*Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 389, fn. 3; *Pacific States Enterprises, Inc. v. City of Coachella* (1993) 13 Cal.App.4th 1414, 1420, fn. 3; *Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 877; see also *Davis v. City of Santa Ana* (1952) 108 Cal.App.2d 669, 684-685.) The parties here, however, have consistently treated AES's motion for judgment on the pleadings as based solely on statute.

AES's demurrer to the third amended complaint did not challenge plaintiffs' negligence claim. Although that demurrer referenced plaintiffs' negligence cause of action, that reference appears to have been made in error. As pointed out by the trial court at the hearing on the motion, AES's memorandum of points and authorities in support of the demurrer did not contain any argument as to the negligence cause of action; accordingly, the court's ruling on the demurer did not refer to the negligence cause of action.

Plaintiffs contend AES's motion was barred, nevertheless, because AES had previously demurred, unsuccessfully, on the same ground, to plaintiffs' negligence claim as it appeared in the first amended complaint. Even assuming AES's demurrer to the negligence claim in the first amended complaint and the motion for judgment on the pleadings were made "on the same grounds" within the meaning of section 438, subdivision (g)(1), the record shows the third amended complaint's allegations relating to the negligence claim were not identical to those contained in the first amended complaint.⁴

Under the heading identifying negligence as the ninth cause of action, the third amended complaint stated, at paragraph 107, the plaintiffs "repeat and reallege paragraphs 1 through 106 above and incorporate same by reference as if set forth herein." At paragraph 40 of the third amended complaint, plaintiffs alleged for the first time that their contract with AES "is represented by the Microbial Inspection Report attached hereto as Exhibit 'E.'" Exhibit E had not been attached to or incorporated into any prior pleading.

⁴ AES demurred to the negligence claim contained in both the first amended complaint and the second amended complaint on the ground the alleged wrongful conduct underlying that claim arose out of the parties' contractual relationship and, thus, plaintiffs were limited to recover contractual damages only.

In support of the breach of contract claim, at paragraph 40, the third amended complaint stated: “Pursuant to their contract, Defendant AES, was to inspect the premises for moisture intrusion and the presence of mold, fungi or other material conditions, and to diagnose and fully remediate same.” In support of the negligence claim, at paragraph 111, the third amended complaint similarly alleged AES breached its duty to plaintiffs by failing to properly inspect the premises “such that all structural problems and damages were discovered.”

The contents of exhibit E, however, contradicted these allegations by showing AES agreed to conduct only a limited mold inspection and “report on [a] mold discovery in [the] laundry room cabinets.” Exhibit E expressly stated AES’s “microbial inspection cannot address all aspects of building structures.” Thus, AES moved for judgment on the pleadings against a negligence claim supported by new allegations that had not yet been tested by demurrer. Section 438, subdivision (g)(1), therefore, did not bar AES’s motion.

II.

The Third Amended Complaint Did Not Allege Facts Sufficient to State a Claim for Negligence.

Plaintiffs contend the trial court erroneously granted AES’s motion for judgment on the pleadings because the third amended complaint alleged sufficient facts to state a claim for negligence. A judgment on the pleadings is reviewed under the same de novo standard applied to a judgment following the sustaining of a demurrer.

(*McCutchen v. City of Montclair* (1999) 73 Cal.App.4th 1138, 1144; *Bocato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797, 1803-1804.) Accordingly, we treat the properly pleaded allegations of a challenged complaint as true, and liberally construe them to achieve ““substantial justice”” among the parties. (*American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118.)

We consider only the allegations of a challenged complaint and matters subject to judicial notice to determine whether the facts alleged state a cause of action under any theory. (*American Airlines, Inc. v. County of San Mateo*, *supra*, 12 Cal.4th at p. 1118.) We may take judicial notice of exhibits attached to a complaint and “[i]f facts appearing in the exhibits contradict those alleged, the facts in the exhibits take precedence.” (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447.) “The well-pled allegations that we accept as true necessarily include the contents of any exhibits attached to the complaint. Indeed, the contents of an incorporated document (in this case, the agreement) will take precedence over and supercede any inconsistent or contrary allegations set out in the pleading. In the case of such a conflict, we will look solely to the attached exhibit.” (*Building Permit Consultants, Inc. v. Mazur* (2004) 122 Cal.App.4th 1400, 1409.)

The elements of a negligence cause of action are duty, breach of duty, proximate cause, and damages. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 614.) Here, in support of the negligence claim, the third amended complaint alleged AES breached its duties to plaintiffs by failing to (1) “properly inspect the premises and such that all structural problems and damages were discovered”; and (2) “make an adequate inspection of the premises, so as to ‘overlook’ or neglect to find major problems with the premises in collusion with the [other] Defendants.” The third amended complaint alleged plaintiffs suffered damage due to ongoing water intrusion that had begun prior to plaintiffs’ purchase of the residence and affected the residence’s roof system, deck system, retaining walls, balconies, windows, doors, patios, walls, and drains.

The trial court granted AES’s motion for judgment on the pleadings because the third amended complaint failed to set forth facts showing (1) AES had a duty to inspect the premises for structural defects and (2) a causal relationship between the breach of duty and the resulting harm.

As discussed *ante*, the third amended complaint's allegations that AES had a duty to inspect the entire premises of the residence for structural defects are directly contradicted by the incorporation of exhibit E into that complaint. Exhibit E stated AES agreed to perform only a "[l]imited [m]old [i]nspection" and specifically, that, at plaintiffs' request, AES agreed to "inspect and report on mold discovery in laundry room cabinets."

Exhibit E further showed that AES conducted such an inspection by reporting: (1) visible mold under the sink in the laundry room cabinets; (2) rot and wet conditions in the cabinets that were in direct contact with the subterranean retaining wall; (3) AES's inspection of the walls and floors for moisture intrusion showed they were "uniformly acceptable," which "indicat[ed] that moisture was not hydrostatically pushing through the foundation walls"; and (4) AES checked the patio above the laundry room and noted, "there can be areas that should be caulked and sealed from moisture intrusion" and "[w]aterproofing of the tile grout should also be maintained." Finally, in exhibit E, AES offered a limited recommendation relevant to the laundry room mold, stating: "The laundry room cabinets should be removed under contained conditions as to not increase the mold spore level during demolition. The rebuilding of the cabinets should be void of any anchor bolts into the retaining wall areas as this could possibly be a path of least resistance for future moisture intrusion."

Furthermore, in exhibit E, AES expressly disclaimed any duty to conduct a broader inspection, stating: "A microbial inspection cannot address all aspects of building structures. Observations are limited to accessibility, visual assessments, moisture readings of suspect building materials and possible reasons for microbial growth when found. When a building's history is not fully known[,] the inspection is compromised by limited information and therefore mold in a building structure may exist even when it is not discovered by inspection."

Exhibit E therefore showed AES agreed to and did conduct a limited mold inspection pertaining to the laundry room cabinets. The content of exhibit E contradicts and supersedes plaintiffs' allegation that AES had assumed the duty to conduct a broader inspection of the premises and discover "all structural problems." (*Sofranek v. County of Merced* (2007) 146 Cal.App.4th 1238, 1241, fn. 1 ["Facts appearing in exhibits attached to the complaint are also accepted as true and given precedence over inconsistent allegations in the complaint"].) Plaintiffs did not allege in the third amended complaint that AES failed to discharge any duty it assumed regarding its limited inspection of mold affecting the laundry room cabinets as reflected in exhibit E or that plaintiffs suffered any harm by any breach of such a duty.

Plaintiffs argue in the opening brief, "even if the [t]rial [c]ourt was correct in utilizing Exhibit 'E' to reach its decision, the contents of Exhibit 'E' establish that [AES] undertook duties far greater than merely 'inspect[ing] the laundry room cabinets for mold.' . . . Exhibit 'E' establishes that [AES] conducted an inspection of the 'concrete walls and floor' of the laundry room, and 'the patio above the laundry room.' . . . Indeed, [AES] conducted a structural inspection as follows: '[c]oncrete walls and floors were checked for moisture intrusion,' and '[t]he patio above the laundry room was checked and there can be areas that should be caulked and sealed from moisture intrusion. Waterproofing of the tile grout should also be maintained.'" Exhibit E's statement that AES's inspection of the mold situation in the laundry room involved checking its attached walls and an overhead patio does not show AES assumed a duty to conduct a broader inspection of the premises.

Plaintiffs also argue the third amended complaint alleged AES owed "various duties, including those imposed by *Civil Code* [section] 1714" and AES breached those duties. Civil Code section 1714, subdivision (a) provides in relevant part: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the

management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.” Plaintiffs’ reference to Civil Code section 1714, without more, fails to allege sufficient facts showing AES breached a duty it owed to plaintiffs. (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 527 [“‘plaintiff must indicate the acts or omissions which are said to have been negligently performed’”].)

Because we conclude the third amended complaint failed to allege AES breached a duty it owed to plaintiffs, we do not need to address the trial court’s other ground for granting AES’s motion—that the third amended complaint failed to allege facts sufficient to show a breach of duty caused plaintiffs harm.

III.

The Trial Court Abused Its Discretion by Denying Leave to Amend.

Plaintiffs contend the trial court abused its discretion by granting AES’s motion for judgment on the pleadings without leave to amend. We review the pleadings to determine whether the third amended complaint could be reasonably amended to support a valid cause of action. (*Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344, 1347.) “Where a complaint could reasonably be amended to allege a valid cause of action, we must reverse the judgment. [Citations.] Leave to amend is liberally allowed; a specific request to amend is not required as a prerequisite to review on appeal the trial court’s decision not to grant leave to amend.” (*Id.* at p. 1348; see *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852 [after motion for judgment on pleadings is granted, “denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment”].) “The burden of proving there is a reasonable possibility the defect can be cured by amendment is on the plaintiff.” (*La Jolla Village Homeowners’ Assn. v. Superior Court* (1989) 212

Cal.App.3d 1131, 1141.) ““Denial of leave to amend after granting a motion for judgment on the pleadings is reviewed for abuse of discretion.”” (*Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 602.)

At the hearing on the motion for judgment on the pleadings, the trial court stated it would grant the motion “[s]ince you cannot change the facts of the limited scope of the retention and duty, there is no leave to amend.” Plaintiffs’ counsel responded by arguing the third amended complaint could be reasonably amended to state a negligence cause of action because evidence existed showing AES assumed broader duties beyond the limited mold inspection described in exhibit E. Plaintiffs’ counsel stated to the trial court: “What you’re relying on in exhibit ‘E’ is the first report. After we filed the third-amended complaint, we got the second report which shows the extent of the retention, which is completely different than exhibit ‘E,’ and this is what I just stated to you in my argument. [¶] Counsel filed a motion for judgment on the pleadings which asks you to construe exhibit ‘E’ without disclosing to you and giving us an opportunity to provide you with the facts and the supplemental report in which they undertook substantially greater duties, all of which were not disclosed to my clients, not just for the structure, but also assumed duties concerning the structure.” The court responded by confirming the motion was granted without leave to amend.

Considering that leave to amend is liberally allowed in such circumstances and that plaintiffs’ counsel informed the court of the existence of additional evidence showing that AES subsequently assumed duties beyond those expressed in exhibit E, the trial court abused its discretion by denying plaintiffs leave to amend. It is reasonably possible plaintiffs can state a cause of action for negligence on the basis of their counsel’s representations to the trial court; the third amended complaint does not show on its face that it is incapable of amendment in the manner described by counsel.

At oral argument on appeal, plaintiffs’ counsel argued that, subsequent to filing the third amended complaint, plaintiffs learned AES performed more work on the

laundry room than known by plaintiffs at the time they filed the third amended complaint and AES failed to disclose to them the extent of mold and damage it had discovered in performing that work. We are uncertain whether these are new allegations or a rephrasing of the statements made to the trial court.

As discussed in detail *ante*, however, plaintiffs' third amended complaint alleged AES agreed only to conduct a limited mold inspection as represented by exhibit E. In amending the third amended complaint, plaintiffs should be mindful that an amended pleading that contradicts facts alleged in an earlier pleading without a satisfactory explanation is subject to challenge. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶ 6:706, p. 6-177 (rev. # 1, 2008); see *Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383, 1390 [“the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so the court may disregard the inconsistent allegations”].)

We recognize that plaintiffs have failed to allege sufficient facts to state a claim for negligence since the time they filed their original complaint in May 2006 until March 2008, when the court granted AES's motion for judgment on the pleadings. We also recognize plaintiffs' failure to allege the “second report” in any of their pleadings during this time. Nevertheless, given the law on the issue of granting leave to amend, we must provide plaintiffs the opportunity to amend and attempt to plead that “second report.”

DISPOSITION

The order granting the motion for judgment on the pleadings is affirmed. The order dismissing with prejudice the third amended complaint as to AES is reversed. We remand to the trial court with directions to grant appellants leave to amend the third

amended complaint to allege a cause of action for negligence. Appellants shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.